
FOR YOUR INFORMATION

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News For School and Municipal Clients

Rights of Employees Returning from Military Leave

At a time when an increasing number of employees are being called from their permanent jobs to serve in this country's armed forces, it is important for school districts to be informed of the reemployment and anti-discrimination rights of uniformed service personnel under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA protects any employee who is absent from work due to voluntary or involuntary service in the uniformed services, which includes active duty, inactive duty, training for active or inactive duty, National Guard duty, and absence due to a fitness exam relating to active or inactive duty. An employee is protected under USERRA for cumulative absences totaling up to five years.

An employee who is absent from work due to military service is entitled to prompt reemployment upon his or her return. An employee who provided one to 90 days of military service must be reemployed in the position he or she would have held had the employee remained continuously employed. The position the employee would have held had he or she remained employed reflects the "escalator" principle. In other words, if the employee would have received a promotion or, alternatively, would have been moved to a lower position, the employee should be reemployed accordingly. This principle may entail reemploying personnel in layoff status. If it is not possible to reemploy the employee in the position he or she would have held had the employee not gone on leave because the employee is not qualified for the position and

cannot become qualified with reasonable effort by the district, the employee must be returned to the position he or she held on the date his service began. If the employee is not qualified for placement in his or her previous position or cannot become qualified with reasonable effort by the district, he or she may be reemployed in a position the employee can perform that most closely approximates the position to which the employee otherwise would have been returned. In any event, an employer need not reemploy a person if the employer's circumstances have changed so as to make reemployment impossible or unreasonable.

An employee who provided 91 or more days of military service must be reemployed in the same order of priority described above, except that the employee may be reemployed in a position of like seniority and status instead of in the actual position he or she held or would have held.

Once an employee is reemployed under USERRA, the employee may not be discharged, except for cause, for up to one year following reemployment, depending on the employee's length of military service.

In order to be guaranteed reemployment under USERRA, an employee must provide notice of military service to his employer prior to beginning leave. An exception exists if it would be impossible or unreasonable for the employee to provide advance notice. Upon return from leave, the employee must report to work according to the following conditions: (1) if the employee served fewer than 31 days, he or she must report to the employer by the beginning of

the first scheduled work day that falls 8 hours after the end of the last calendar day of military service; (2) if the employee served between 31 and 180 days, he or she must submit an application for reemployment within 14 days after the completion of military service; and (3) if the employee served more than 180 days, he or she must submit an application for reemployment within 90 days after the completion of military service. In any case, if it is impractical for an employee to report to work or submit an application within the applicable time frame, the employee should do so on the next day possible.

Upon an employee's return to work following 31 days or more of absence due to military service, a district may require documentation that the employee (1) submitted a timely application for reemployment, (2) did not exceed the five-year limitation, and (3) was honorably released from military service.

USERRA does not require the district to pay the employee's salary while he or she is on military leave, although an employee must be permitted to use accrued leave time, such as vacation time, upon request. However, an employee cannot be required to use accrued leave time. Districts must provide retroactive contributions to the employee's pension plan when they return.

In addition to USERRA's reemployment, seniority, and benefits provisions, USERRA also protects uniformed service personnel from discrimination. An employer may not take any adverse employment action against a service member unless the employer can show that it would have taken the adverse employment action regardless of the employee's military

affiliation.

The Veterans Benefits Improvement Act of 2004 made two major changes to USERRA that affect school district employers. The first change is that an employee on military leave must be permitted to continue health insurance coverage for 24 months. An employee who will be on military leave for 30 days or less cannot be required to pay more than his or her normal share of any health insurance premium. An employee who will be on leave for 31 days or more may be required to pay up to 102% of the full insurance premium. Under prior law, the employee was only guaranteed the right to continue coverage for the lesser of 18 months or until the date on which the employee failed to return to or reapply for employment after completing leave. The new 24-month coverage period applies to employee elections to continue coverage made on or after December 10, 2004.

The second major change to USERRA is that employers must provide notice to employees of their rights and benefits under USERRA. A district may satisfy the notice requirement by posting the Secretary of Labor's USERRA notice poster in the place where the employer regularly posts notices for employees. The poster may be obtained from the Department of Labor, or downloaded from the Department's website at <http://www.dol.gov>.

In addition to the provisions discussed above, USERRA contains a few exceptions that are beyond the scope of this article. Districts may want to seek legal advice on specific employee questions to ensure compliance with USERRA.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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